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LIMITATIONS ON THE APPLICABILITY OF THE FELONY-MURDER RULE IN CALIFORNIA

The term felony-murder is a shorthand phrase which signifies that malice will be imputed to a person who, while engaged in the perpetration of certain dangerous felonies, causes the death of another person. Malice aforethought, which Professor Perkins defines as "an unjustifiable, unexcusable and unmitigated man-endangering-state of mind"[1] is conclusively presumed by the defendant's participation in the underlying felony. This presumed malice—given that a causal relation exists between the felony and the death—is sufficient to justify a conviction of first degree murder. It is no defense that the killing was accidental or negligent; malice is presumed despite the unintentional nature of the death.

At early common law all felonies were within the purview of this rule. Blackstone stated this broad doctrine quite simply: "And if one intends to do another felony, and undesignedly kills a man, this is also murder."[2] Blackstone's statement of the rule was subsequently modified by the case law. The modern English rule came to be that only a homicide which resulted from a felony committed in a dangerous way was murder.[3] The law in the United States is somewhat different, as the rule applies only to a homicide occurring during the perpetration of an "inherently dangerous felony."[4] In California the felony-murder rule is embodied in Penal Code section 189: "All murder which . . . is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, or any act punishable under section 288, is murder of the first degree."[5]

In the typical felony-murder situation, the defendant kills his victim,[6] an innocent bystander[7] or a police officer[8] while committing one of the enumerated dangerous felonies. This Note will analyze the legal and logical difficulties of applying the felony-murder rule to

1. R. PERKINS, CRIMINAL LAW 48 (2d ed. 1969) [hereinafter cited as PERKINS].
2. 4 W. BLACKSTONE, COMMENTARIES *201.
3. England has since abolished the felony-murder rule. Homicide Act of 1957, 5 & 6 Eliz. 2, c. 11, § 1.
4. People v. Philips, 64 Cal. 2d 574, 578, 414 P.2d 353, 357, 51 Cal. Rptr. 225, 229 (1966).
5. CAL. PEN. CODE § 189.
6. *E.g.*, People v. Bosby, 256 Cal. App. 2d 209, 64 Cal. Rptr. 159 (1967).
7. *E.g.*, People v. Ulsh, 211 Cal. App. 2d 258, 27 Cal. Rptr. 408 (1962).
8. *E.g.*, People v. Mitchell, 61 Cal. 2d 353, 392 P.2d 526, 38 Cal. Rptr. 726 (1964).

variations of the typical situation. The following variations will be discussed: (1) The unintentional self-infliction of death by one of the accomplices; (2) the intentional slaying of a cofelon by his confederate; and (3) the commission of an act by the intended victim, police officer, or bystander which results in the death of one of the conspirators or of a third party. In such circumstances the criminal responsibility of the felon for the death in question has not always been certain. American courts have arrived at different results under different theories. The basic principle underlying the California decisions is that a felon cannot be found guilty of murder under the felony-murder rule if the homicide was not committed in furtherance of, or to perpetrate, the underlying felony. The evolution of the California restrictions upon the felony-murder rule will now be examined in detail.

California: From Ferlin to Taylor

A. Ferlin and Cabaltero: Are They Reconcilable?

People v. Ferlin[9] was the first California case in which the state attempted to hold a defendant criminally responsible for the death of his coconspirator under the felony-murder rule. The evidence indicated that the defendant and Skala conspired to burn the former's building, thus permitting him to obtain the proceeds from an insurance policy.[10] The defendant was not present when Skala set the fire, from which he received burns resulting in his death.[11] The defendant was found guilty of murder, but the trial court granted his motion for a new trial.

The California Supreme Court, affirming the order for a new trial, held that the felony-murder rule was inapplicable for two reasons. First, the court referred to the Penal Code's definition of murder: "the unlawful killing of a human being with malice aforethought."[12] It was absurd to argue, the court said, that one accidentally killing himself while engaged in the commission of a felony could be guilty of murder under that definition.[13] Although the court did not fully explain why such a result would be preposterous, the reason should be clear: A person unintentionally inflicting serious bodily injury upon himself cannot possibly be said to have acted with malice. Nor has he committed a homicide, an essential element of murder.[14] If, however, the defendant in this case were convicted of murder, then, said the court, under the law of conspiracy, which provides that each coconspirator is

9. 203 Cal. 587, 265 P. 230 (1928).
10. *Id.* at 590, 265 P. at 232.
11. *Id.* at 596, 265 P. at 234.
12. *Id.*
13. *Id.*
14. PERKINS, *supra* note 1, at 34.

liable for the acts of his accomplice,[15] the deceased would have been guilty of his own murder. Therefore, the court concluded that it could not "be seriously contended that one accidently killing himself while engaged in the commission of a felony was guilty of murder."[16] That the accidental death occurred during the perpetration of a crime is immaterial.

The court's second reason was that the death of Skala was not in furtherance of the crime.[17] As explained above, the law of conspiracy holds each of the coconspirators liable for all acts which aid in perpetrating the contemplated felony. Moreover, the converse is true: If the acts of a cofelon do not further the crime in question, then only he, not his conspirators, will be held accountable.[18] Applying this doctrine, the court said:

> It cannot be said from the record in the instant case that defendant and deceased had a common design that deceased should accidentally kill himself. Such an event was not in furtherance of the conspiracy, but entirely opposed to it.[19]

The court supported its statement by citing the Illinois decision of *People v. Garippo*.[20] In that case while four conspirators were committing a robbery, one of the robbers was fatally wounded. It was not certain who fired the fatal shot.[21] When his coconspirators were tried for his death, the trial court instructed the jury that the defendants were responsible for the homicide if it occurred during the commission of the felony. The appellate court reversed, holding that the death in question could not be considered to be in furtherance of the crime.[22] "Without doubt there was a common design among these [defendants] to hold up the [victim], but this design had nothing whatever to do with the shooting of the [deceased coconspirator]."[23]

Although it was necessary for the *Ferlin* court to apply this reasoning only to a self-inflicted death, the rationale has broader applicability. *Ferlin* may be said to stand for the general proposition that no death of a conspirator, whether self-inflicted or not, can be in the furtherance of the contemplated felony. It therefore follows, at least under the reasoning of *Ferlin*, that the felony-murder rule should never be applicable when a cofelon has been slain.[24]

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15. *Id.* at 632-35.
16. 203 Cal. at 596, 265 P. at 234.
17. *Id.* at 597, 265 P. at 235.
18. PERKINS, *supra* note 1, at 634.
19. 203 Cal. at 597, 265 P. at 235.
20. 292 Ill. 293, 127 N.E. 75 (1920).
21. *Id.* at 295, 127 N.E. at 76.
22. *Id.* at 298, 127 N.E. at 77.
23. *Id.*
24. It is, however, possible that, under different circumstances than those in

However, in *People v. Cabaltero*,[25] decided in 1939, the district court of appeal affirmed the convictions of appellants who were found guilty of the intentional slaying of a fellow conspirator during the perpetration of a felony. In this case seven men conspired to commit a robbery. When six of them arrived at the office of the intended victim, three of the robbers remained outside as lookouts, while the others entered the building. The deceased (Ancheta), one of the lookouts, was fatally shot by an accomplice, who was apparently angry at Ancheta for having fired his gun at some passersby.[26]

The court distinguished the factual situation at bar from that in *Ferlin*:

> [In *Ferlin*] the coconspirator killed himself while he alone was perpetrating the felony he conspired to commit; whereas, here the coconspirator was killed by one of his confederates while all were perpetrating the crime they conspired to commit.[27]

The court took the position that the felony-murder rule applies to "*any killing* by one engaged in the commission of any of the felonies enumerated in said section 189,"[28] thus confining the reasoning in *Ferlin* to factual situations involving the unintentionol, self-inflicted death of a cofelon. The court distinguished *People v. Garippo*[29] on the ground that it was not certain who fired the fatal shot in that case.[30] The court believed that the Illinois court exculpated the coconspirators solely because it could not be proven that one of them fired the fatal shot. In *Cabaltero*, however, there was no doubt that one of the conspirators shot the deceased.[31]

Although the court correctly distinguished the factual situation at bar from those in *Ferlin* and *Garippo*, it failed to evaluate the rationale on which the two latter cases were based. In both cases the respective courts said that the death of the coconspirator was not part of the com-

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Ferlin, a felon may be convicted for the murder of his partner although he has not actually committed the homicide. If the deceased has died as a result of the defendant's conduct which, independent of the felony, may be considered malicious, then the felon will be held responsible for the death. It must be emphasized, however, that criminal responsibility in such a situation is *not* predicated upon the felony-murder rule. For a discussion of what acts committed during a felony may be deemed to be malicious, see text accompanying notes 42-91 *infra*.

25. 31 Cal. App. 2d 52, 87 P.2d 374 (1939), *noted in* 27 CALIF. L. REV. 612 (1939).

26. 31 Cal. App. 2d at 56, 87 P.2d at 366. The conspirator who was not present at the robbery was tried for both robbery and murder, but was convicted only of the former crime.

27. *Id.* at 60, 87 P.2d at 368.

28. *Id.* at 58, 87 P.2d at 367.

29. 292 Ill. 293, 127 N.E. 75 (1920).

30. 31 Cal. App. 2d at 60, 87 P.2d at 368.

31. *Id.*

mon design to commit the felony. Rather than furthering the conspiracy, by promoting the successful perpetration of the felonies, the deaths of the accomplices hindered the successful completion of the crimes in question. The *Cabaltero* court should have applied the same reasoning. It cannot possibly be argued that the conspirators had a common design to kill the decedent, since it is clear from the facts that his death was not planned. Moreover, the killing of a coconspirator is an act likely to impede the successful completion of the felony. Therefore, the killing should have been considered an act not in furtherance of the common design of the conspiracy and thus not imputable to the conspirators who had not fired the fatal shot.

Rather than adopting the above reasoning, the court denied the defendants the benefit of the doctrine that the acts of a coconspirator not in furtherance of the original plan may not be imputed to any of his accomplices. The court dismissed the application of the doctrine with one sentence: "Such a doctrine is not available, however, to co-conspirators in cases such as this, where the killing is done during the perpetration of a robbery in which they were participating."[32] *Cabaltero* thus held that once it is established that a killing occurred during the perpetration of certain felonies, the felony-murder rule may properly be invoked. One author pointed out the absurd results to which the reasoning in *Cabaltero* could lead:

> Applying the expressed *ratio* of *Cabaltero*, if one of two burglars ransacking a home glances out of a window, sees his enemy for whom he has long been searching and shoots him, the unarmed accomplice, party only to the burglary, will be guilty of murder in the first degree.[33]

Under the established law of conspiracy, such a result would be patently unjust.

Both *Ferlin* and *Cabaltero* remain the law in California. In two recent court of appeal cases with factual situations almost identical to *People v. Ferlin* that case was followed.[34] In both cases the person hired to set fire to a building accidentally burned himself to death.' The court in each case refused to hold the defendant responsible for the death. In one case the prosecution tried to argue that *Cabaltero* had over-

32. *Id.* at 61, 87 P.2d at 368.

33. Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U. PA. L. REV. 50, 73 (1956). This article also discusses the early English case of Rex v. Plummer, 84 Eng. Rep. 1103 (K.B. 1708), wherein one conspirator intentionally shot one of his partners because he believed the latter had informed the police of their unlawful plan. Since the defendant, also an accomplice, did not fire the shot which killed his coconspirator, the English court held he could not be convicted, as the murder was not done in furtherance of the conspiracy. *Id.* at 1105.

34. People v. Jennings, 243 Cal. App. 2d 324, 52 Cal. Rptr. 329 (1966); Woodruff v. Superior Court, 237 Cal. App. 2d 749, 47 Cal. Rptr. 291 (1965).

ruled *Ferlin sub silentio*.[35] The court rejected this argument, emphasizing the factual distinction between *Ferlin* and *Cabaltero* that had led to different results: Skala killed himself and Ancheta was intentionally shot by a coconspirator.[36]

Thus, the California courts have adopted two inconsistent rules: When a conspirator accidentally kills himself during the commission of a felony, the death will not be considered to be in furtherance of the common plan and the defendant will not be convicted under the felony-murder rule. However, if a cofelon shoots his accomplice during the felony, the death need not be in furtherance of the conspiracy to render the defendant criminally liable under the rule. There is no logical reason for this distinction. Both deaths occurred during the commission of a felony; both deaths hindered the successful completion of the felony. Therefore, it is submitted that *Ferlin* and *Cabaltero* are irreconcilable.[37]

B. Responsibility for a Homicide Committed by a Non-Felon

The California courts have developed a different approach in cases where someone other than a felon performs the act resulting in a death during the perpetration of a felony. The first case of this type is *People v. Harrison*.[38] The defendant and Blackshear entered a cleaning establishment intending to rob it. When Harrison began shooting, an employee returned the gunfire. One of the employee's shots mortally wounded the owner.[39] The court affirmed the first degree murder conviction of the defendants.[40] The court based its holding on the ground that the defendants were the proximate cause of the death of the proprietor. It was foreseeable that the robbery would provoke the victims to defend their property and lives, and that this defense would place bystanders in a position of danger. Therefore, the court concluded that

35. Woodruff v. Superior Court, 237 Cal. App. 2d 749, 750, 47 Cal. Rptr. 291, 293 (1965).

36. *Id.* at 751, 47 Cal. Rptr. at 293.

37. The supreme courts of Montana and Pennsylvania have both been called upon to decide whether the felony-murder rule may be applied to factual situations similar to that of *Ferlin*. State v. Morran, 131 Mont. 17, 306 P.2d 679 (1957); Commonwealth v. Bolish, 391 Pa. 550, 138 A.2d 447 (1958). Both states held that the felony-murder rule was applicable. In Commonwealth v. Bolish, 391 Pa. 550, 553, 138 A.2d 447, 449 (1958), the Pennsylvania court said, "The element of malice, present in the design of defendant, necessarily must be imputed to the resulting killing, and made him responsible for the death." Both courts failed to realize that there was no killing of one human being by another involved in these cases. Moreover, the Pennsylvania court declared that since the deceased died while trying to perpetrate the felony, his death was in furtherance of the felony. *Id.*

38. 176 Cal. App. 2d 330, 1 Cal. Rptr. 414 (1959).

39. *Id.* at 331, 1 Cal. Rptr. at 415-16.

40. *Id.* at 346, 1 Cal. Rptr. at 425.

the defendants could properly be convicted of first degree murder by application of the felony-murder rule.[41]

The Supreme Court of California abandoned the line of reasoning used in *People v. Harrison* when it decided *People v. Washington*[42] in 1965. The defendant and Ball attempted to rob a gas station. When Ball entered the office with a gun aimed at the owner, the latter, having been warned by a shout of "robbery," fatally shot Ball. The owner, seeing Washington running from the vault, shot and wounded him.[43] The court reversed Washington's conviction of the first degree murder of Ball.[44] Chief Justice Traynor, speaking for the court, emphatically stated that, when one of the felons does not commit the homicide, that death does not come within the purview of the felony-murder rule.[45] The Chief Justice observed that:

> When a killing is not committed by a robber or by his accomplice but by his victim, malice aforethought is not attributable to the robber, for the killing is not committed by him in the perpetration or attempt to perpetrate robbery. It is not enough that the killing was a risk reasonably to be foreseen and that the robbery might therefore be regarded as a proximate cause of the killing. Section 189 requires that the felon or his accomplice commit the killing, for if he does not, the killing is not committed to perpetrate the felony.[46]

The Chief Justice stated that the purpose of the felony-murder rule was to deter persons from killing accidentally or negligently during the commission of a felony by holding them strictly responsible for any homicide they commit. The purpose of the rule is not to prevent the commission of felonies. Therefore, the rule does not compel holding felons strictly responsible for killings comitted by their victims.[47] To invoke the rule when the intended victim or bystander commits the homicide would be to punish the defendants not for their own conduct, "but solely on the basis of the response by others that the robber's conduct happened to induce."[48]

The court, however, made it clear that a defendant in some cases may be held criminally liable for a felony-related homicide which he did not commit. The court postulated the situation of a felon who initiates a gun battle, thereby doing an intentional act " 'that involves a

41. *Id.* at 345, 1 Cal. Rptr. at 425.
42. 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965).
43. *Id.* at 779, 402 P.2d at 132, 44 Cal. Rptr. at 444.
44. *Id.* at 785, 402 P.2d at 135, 44 Cal. Rptr. at 447.
45. *Id.* at 781, 402 P.2d at 133, 44 Cal. Rptr. at 445.
46. *Id.*
47. *Id.*
48. *Id.*

high degree of probability that it will result in death.' "[49] In such a case it is neither necessary nor permissible to impute malice by the invocation of the felony-murder rule. Under the rules of causation, the defendant's initiatory act, independent of the attempted commission of the felony, will be sufficient to imply the necessary element of malice.[50] The defendant will then be held responsible for any reasonable response to his act.[51] But, it is necessary to emphasize, the felony *alone* was not sufficient under the *Washington* rule to supply the requisite mens rea of malice.[52]

The above dictum in *Washington* became the holding in the case of *People v. Gilbert*.[53] In *Gilbert*, the defendant and Weaver robbed a savings and loan association office. As the two were leaving the building, Gilbert fatally shot a police officer; another police officer then mortally wounded Gilbert's accomplice.[54] Clearly, Gilbert fired the first shot of the gun battle, but the Supreme Court reversed his murder conviction for the death of the accomplice because it was clear the court had instructed the jury that the felony-murder rule could be used to raise both homicides to the level of first degree murder.[55] Under the holding of the *Washington* case, the court pointed out, a defendant may be convicted of murder only if malice is established independently of the felony-murder rule.

Relying upon his *Washington* analysis, Chief Justice Traynor then outlined the theory under which Gilbert could be convicted of first degree murder for the death of Weaver. "Murder is the unlawful killing of a human being, with malice aforethought."[56] Malice aforethought can no longer be automatically imputed to felons if they have not committed a homicide during one of the enumerated felonies. But malice may be implied under Penal Code section 188 if the defendant or de-

49. *Id.* at 782, 402 P.2d at 134, 44 Cal. Rptr. at 446, *quoting* People v. Thomas, 41 Cal. 2d 470, 480, 261 P.2d 1 (1953).

50. "Such malice may be expressed or implied. It is expressed when there is manifested a deliberate intention unlawfully to take away the life of a fellow-creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned or malignant heart." CAL. PEN. CODE § 188.

51. 62 Cal. 2d at 782, 402 P.2d at 134, 44 Cal. Rptr. at 446.

52. It is perhaps more than a coincidence that Chief Justice Traynor's hypothetical in *Washington* paralleled the facts of *Harrison*. Although the Chief Justice disapproved of the proximate cause rationale used in *Harrison*, his analysis would indicate that court could have achieved the same result by the application of the rules of causation. *Id.* at 782 n.2, 402 P.2d at 134 n.2, 44 Cal. Rptr. at 446 n.2.

53. 63 Cal. 2d 690, 408 P.2d 365, 47 Cal. Rptr. 909 (1965).

54. *Id.* at 696-97, 408 P.2d at 369, 47 Cal. Rptr. at 913.

55. *Id.* at 703, 408 P.2d at 373, 47 Cal. Rptr. at 917.

56. CAL. PEN. CODE § 187.

fendants do an act which is in "wanton disregard for human life."[57] Chief Justice Traynor stated that "[i]nitiating a gun battle is such an act."[58]

The court next indicated that the killing must be "attributable, not merely to the commission of a felony, but to the intentional act of the defendant or his accomplice committed with conscious disregard for life."[59] Thus, if the victim of the felony or a police officer kills someone in a reasonable response to the act of the defendant, the killing is attributable to the defendant. Thus, the court concluded, malice has been established without reference to the felony-murder rule and the homicide is therefore murder.[60]

Chief Justice Traynor then applied the degree statute:

> When murder is established under Penal Code sections 187 and 188 pursuant to the principles defined above, section 189 may properly be invoked to determine the degree of that murder. Thus, even though malice aforethought may not be implied under section 189 to make a killing murder unless the defendant or his accomplice commits the killing in the perpetration of an inherently dangerous felony . . . when a murder is otherwise established, section 189 may be invoked to determine its degree.[61]

Although Chief Justice Traynor did not state explicitly the manner in which section 189 was to be employed, it seems clear that he was referring to the "wilful, deliberate, and premeditated killing"[62] clause of that section, not to the felony-murder provision.[63] If the jury should find that the defendant's act of firing first was deliberate and premeditated then they could find the defendant guilty of first degree murder.

Thus the California court held that under an alternative theory of liability[64] a felon may be found guilty of first degree murder for a homicide committed by his victim or a bystander. Under the pre-*Washington* application of the felony-murder rule such a defendant was guilty

57. 63 Cal. 2d at 704, 408 P.2d at 373, 47 Cal. Rptr. at 917. For the text of Penal Code section 188, see note 50 *supra.*

58. 63 Cal. 2d at 704, 408 P.2d at 373, 47 Cal. Rptr. at 917.

59. *Id.* at 704, 408 P.2d at 374, 47 Cal. Rptr. at 918.

60. *Id.*

61. *Id.* at 705, 408 P.2d at 374, 47 Cal. Rptr. at 918.

62. See PERKINS, *supra* note 1, at 722 n.60. CAL. PENAL CODE § 189 provides in part: "All murder which is perpetrated by . . . any . . . kind of wilful, deliberate, and premeditated killing . . . is murder of the first degree. . . ."

63. For the felony-murder provision of CAL. PENAL CODE § 189, see text accompanying note 5 *supra.*

64. It is true that this alternative theory is merely the application of well-established rules of causation. *See* PERKINS, *supra* note 1, at 719-22. The term "alternative theory of liability" is used throughout this article as a matter of convenience, not to suggest that Chief Justice Traynor had developed a theory of liability that had never before been considered.

of first degree murder as a matter of law. Under *Washington* and *Gilbert* it becomes a question of fact for the jury whether the defendant's conduct was sufficiently aggravated to justify a conviction of first degree murder. In these two decisions the California Supreme Court both restricted the scope of the felony-murder doctrine and provided a rational basis for punishing those who, while committing dangerous felonies, initiate gun battles resulting in death.

Since *Gilbert* the California appellate courts have twice been called upon to apply Chief Justice Traynor's alternative theory.[65] In neither case, however, did the court faithfully follow the lead of the Chief Justice. In *People v. Reed*[66] the court of appeal both misunderstood the purpose for which section 189 was to be invoked and seemingly expanded the definition of "initiatory act." In the 1970 case of *Taylor v. Superior Court*,[67] this apparent expansion was accepted by the California Supreme Court which thus repudiated its 5-year old *Washington* decision.

In *People v. Reed*[68] the defendant appealed the order of the superior court denying him a new trial for the charges of first degree murder, robbery and kidnapping for the purpose of robbery. Reed had robbed a gas station and was about to leave, taking the gas station attendant with him, when the police arrived. Defendant was entering the back seat of the car of the attendant but got out when the police ordered him to halt. When one of the police officers saw Reed start to point his gun, first in the police officer's direction and then in the direction of the attendant, the officer fired three shots. One of these shots killed the attendant.[69]

The court of appeal, in affirming the defendant's first degree murder conviction, followed the alternative theory as stated in *Gilbert*. In *Reed*, however, the defendant did not initiate the gunplay. The court nevertheless thought it would be unreasonable to allow the robber the courtesy of the first shot, holding that the defendant by pointing his gun at the victim and the police officer was the real initiator of the gun battle. Therefore, the court found that the necessary element of malice was supplied by the pointing of the gun, the police officers response was reasonable, and hence the defendant was the proximate cause of the death.[70] When section 189 was invoked, the defendant's liability was determined to be first degree murder.[71]

65. Taylor v. Superior Court, 3 Cal. 3d 578, 477 P.2d 131, 91 Cal. Rptr. 275 (1970); People v. Reed, 270 Cal. App. 2d 37, 75 Cal. Rptr. 430 (1969).

66. 270 Cal. App. 2d 37, 75 Cal. Rptr. 430 (1969).

67. 3 Cal. 3d 578, 477 P.2d 131, 91 Cal. Rptr. 275 (1970).

68. 270 Cal. App. 2d 37, 75 Cal. Rptr. 430 (1969).

69. *Id.* at 41-42, 75 Cal. Rptr. at 433.

70. *Id.* at 45-46, 75 Cal. Rptr. at 435.

71. *Id.* at 47-48, 75 Cal. Rptr. at 437.

Rather than using the theory enunciated in *Washington* and *Gilbert* for affirming the defendant's conviction of first-degree murder, the court could have employed the rationale of the "shield" cases. The law is well settled that a felon has acted with malice when he uses his victim or a bystander as a shield to protect himself from the gunfire of the police.[72] If he is killed by the officers' bullets, it is the defendant who, acting with express malice, has caused the death. In *Reed*, when the defendant placed the victim in the car, he exposed him to the deadly fire of the police. Therefore, he was clearly guilty of murder. If the *Reed* court had applied the "shield" theory, it could have held the defendant responsible for the death of his victim without having to expand the *Washington-Gilbert* meaning of "initiatory act." As will be discussed later, the supreme court in *Taylor v. Superior Court*[73] used the holding of the *Reed* case as a foundation for its repudiation of the *Washington* decision.

The *Reed* court further deviated from *Gilbert* by misapplying section 189. As discussed above, *Gilbert* required the jury to determine whether the defendant had acted wilfully, deliberately and with premeditation, thereby meeting the criteria of section 189 for first degree murder. After quoting Chief Justice Traynor's statement regarding the invocation of section 189, the *Reed* court went on to say:

> In other words, although a homicide committed neither by the defendant, nor by an accomplice, cannot be felony murder, *if the victim is killed in the "perpetration or attempt to perpetrate . . . robbery . . .*" and the defendant is guilty of murder because of his "conscious disregard for life," *then the murder will be of the first degree.*[74]

It seems evident that the *Reed* court failed to comprehend Chief Justice Traynor's analysis of section 189 as stated in *Washington* and *Gilbert*. In *Washington* the Chief Justice reasoned that the felony-murder provision of section 189 was inapplicable to the facts at bar:

> Section 189 requires that the felon or his accomplice commit the killing, for if he does not, the killing is not committed *to* perpetrate the felony. Indeed, in the present case the killing was committed to thwart a felony. To include such killings within Section 189 would expand the meaning of the words "murder . . . which is committed in the perpetration . . . [of] robbery . . ." beyond common understanding.[75]

When a homicide is determined to be murder under the alternative theory, the felony-murder provision at section 189 cannot be applied to

72. For further discussion, see text accompanying notes 124-26 *infra*.

73. 3 Cal. 3d 573, 477 P.2d 131, 91 Cal. Rptr. 275 (1970).

74. 270 Cal. App. 2d at 47-48, 75 Cal. Rptr. at 437 (emphasis added).

75. People v. Washington, 62 Cal. 2d 777, 781, 402 P.2d 130, 133, 44 Cal. Rptr. 442, 445 (1965) (emphasis added).

convict the defendant of first degree murder because the killing was not committed *to* perpetrate the felony. If the reasoning in *Reed* is accepted, however, then for the purpose of applying the degree statute a murder that has occurred *during* the perpetration of a felony will be legally equivalent to a murder that was committed *in* the perpetration of the felony. The defendant therefore must invariably be convicted of first degree murder—a theory which is clearly not supported by the *Gilbert* decision. The *Reed* perversion of the *Gilbert* rule would make the question of first degree murder one of law and not of fact.

The most recent California case in which the intended victim of the felony committed the homicide is *Taylor v. Superior Court*,[76] decided in 1970 by the supreme court. While the defendant waited in a getaway car, Daniels and Smith entered a liquor store operated by Mr. and Mrs. West. Mrs. West, who was on a ladder when the two men entered the store, heard Daniels order her husband to "[p]ut the money in a bag,"[77] and make several threats that Mr. West would be killed if he did not comply with their demands. During this time Smith was holding a gun on Mr. West. When Daniels forced Mr. West to the floor, Mrs. West began firing with a hidden gun, fatally wounding Smith, who had returned her gunfire.[78]

The court held that the evidence justified a prosecution for first degree murder.[79] Conceding that the felony-murder rule was inapplicable, Justice Burke, writing for the majority, used the *Washington-Gilbert* alternative theory to dispose of the case. Citing *Washington*, the court stated that malice may be implied from the acts of a conspirator that are done in wanton disregard for human life.[80] The majority opinion then quoted *Gilbert* for the proposition that any reasonable response to such an act is attributable to the defendant or his accomplice.[81] The court stated that the "central inquiry in determining criminal liability for a killing committed by a resisting victim or police officer is whether the *conduct* of a defendant or his accomplices was sufficiently provocative of lethal resistance to support a finding of implied malice."[82] Since neither the defendant nor his accomplices had fired the first shot, the court relied on *Reed* to hold that the felons' "aggressive actions" falling short of firing the first shot may be sufficiently malicious to initiate the gunplay.[83] The aggressive actions in *Taylor* were the pointing of

76. 3 Cal. 3d 578, 477 P.2d 131, 91 Cal. Rptr. 275 (1970).

77. *Id.* at 581, 477 P.2d at 132, 91 Cal. Rptr. at 276.

78. *Id.*, 477 P.2d at 132-33, 91 Cal. Rptr. at 276-77.

79. *Id.* at 585, 477 P.2d at 135, 91 Cal. Rptr. at 279.

80. *Id.* at 582, 477 P.2d at 133, 91 Cal. Rptr. at 277.

81. *Id.*

82. *Id.* at 583, 477 P.2d at 134, 91 Cal. Rptr. at 278.

83. *Id.* at 584, 477 P.2d at 134, 91 Cal. Rptr. at 278. The court also relied on the case of Brooks v. Superior Court, 239 Cal. App. 2d 538, 48 Cal. Rptr. 762 (1966).

the gun and the repeated verbal threats of bodily harm.[84]

In his dissent, Justice Peters argued that the majority opinion had overruled *People v. Washington*[85] *sub silentio* and had repudiated much of *People v. Gilbert*:[86]

> In holding that petitioner can be convicted of murder of John H. Smith, the majority repudiate this court's holdings in *People v. Washington* . . . and *People v. Gilbert* . . . that robbers cannot be convicted of murder for a killing by a victim unless the robbers commit malicious acts, in addition to the acts constituting the underlying felony, which demonstrate culpability beyond that of other robbers.[87]

The only difference between *Washington* and the instant case, Justice Peters declared, was that in *Washington* Ball had made no verbal threats when he pointed the gun at the gas station owner while in the case at bar Daniels had threatened repeatedly to "execute" Mr. West.[88] This distinction, however, should not be controlling. If it is, it results

> in the absurd distinction that robbers who point guns at their victims without articulating the obvious threat inherent in such action cannot be convicted of murder for a killing committed by the victims, whereas robbers who point guns at their victims and articulate their threat can be convicted of murder in the same situation. To hold, as do the majority, that petitioner can be convicted of murder for acts which constitute a first degree robbery solely because the victims killed one of the robbers is in effect to reinstate the felony-murder rule in cases where the victim resists and kills.[89]

In making this distinction without a difference, the court clearly overruled the *Washington* decision which, said the dissent,

> stands for the proposition that the act of pointing a gun at the victim, unlike the act of initiating a gun battle, is *not* an act done " 'with wanton disregard for human life,' " involving " 'a high

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But the *Brooks* case does not lend support to the majority argument in *Taylor*. In *Brooks* the petitioner was in a riot area and was ordered to leave by a police officer at gun point. Brooks grabbed the gun, which discharged, killing one of the police officers. Thus, because the defendant's act was a direct cause of the officer's death, there was really no question of causation as there was in *Washington*. Rather, the court had to decide whether the defendant had acted maliciously in causing the death. As Justice Peters observed in his dissent in *Taylor*, "causing a gun to discharge by attempting to wrestle it from another is almost tantamount to shooting a gun one's self [*sic*]." 3 Cal. 3d at 591, 477 P.2d at 140, 91 Cal. Rptr. at 284.

84. 3 Cal. 3d at 584, 477 P.2d at 135, 91 Cal. Rptr. at 279.
85. 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965).
86. 63 Cal. 2d 690, 408 P.2d 365, 47 Cal. Rptr. 909 (1965).
87. 3 Cal. 3d at 585, 477 P.2d at 135, 91 Cal. Rptr. at 279 (Peters, J., dissenting).
88. *Id.*, 477 P.2d at 135, 91 Cal. Rptr. at 279-80.
89. *Id.*, 477 P.2d at 135-36, 91 Cal. Rptr. at 279-80 (dissenting opinion).

degree of probability that it will result in death' " from which malice can be implied.[90]

Continuing his attack on the majority opinion, Justice Peters asserted that the acts of the felons in *Taylor*, like those in *Washington*, constituted nothing more than first degree robbery. Since the robbers committed no additional acts, the majority was using the robbery to supply the element of malice necessary for murder. Thus, the felony-murder rule was effectively reinstated.[91]

To summarize, *Washington* held the felony-murder rule could not be invoked if a felon did not commit the homicide. To convict the felon of murder, the state has to establish malice without reference to the underlying felony. The defendant must have committed some act other than the *res gestae* of the felony from which malice may be implied. In *Gilbert*, the act held to be malicious was the firing of a shot which initiated a gun battle. Although *Reed* seemingly held that the pointing of a gun was sufficiently malicious to justify a conviction of murder, the "shield case" rationale is a better justification for the affirmance of the conviction.[92] In *Taylor*, however, the supreme court effectively held that malice may be implied from the *res gestae* of a robbery. Its reliance on verbal threats can only be characterized as make-weight.

Thus, the California appellate courts have made a complete circle, for they are once again recognizing the underlying felony as the proximate cause of the death. Despite the *Washington* holding, a felon may be convicted under a modified version of the felony-murder rule for a homicide whch he did not commit. If the *Taylor* decision is followed, the perpetration of a felony—without more—will constitute malice. It is true, of course, that the degree of murder is still a question for the jury and, to that extent, *Washington* has retained its vitality. But the supreme court is no longer adhering to the spirit of that decision, for the distinction between the commission of the felony and the initiatory act has been obliterated.[93]

Thus far, this paper has attempted to analyze the limitations on the

90. *Id.* at 586, 477 P.2d at 136, 91 Cal. Rptr. at 280 (dissenting opinion).

91. *Id.* at 590, 477 P.2d at 139, 91 Cal. Rptr. at 284-85 (dissenting opinion).

92. In his *Taylor* dissent, Justice Peters argued that *Reed* might be properly characterized as a shield case. *Id.* at 590-91, 477 P.2d at 140, 91 Cal. Rptr. at 284.

93. While Chief Justice Traynor stated that an initiatory act must be something "more" than the underlying felonious act and, in *Gilbert*, held that initiating a gun battle satisfies this requirement, the point at which an action ceases to be merely a felonious act and becomes an initiatory act is unsettled. This is clearly a question of fact to be decided on a case-by-case basis if this portion of the *Washington-Gilbert* rule is to retain vitality. The *Taylor* decision, however, repudiates this distinction and effectively reinstitutes the older felony-murder rule of imputing malice solely on the basis of the underlying felonious act.

felony-murder rule in California. The next question is whether substantial justice is achieved under the present state of the law. In order to answer that question it will be useful to see how the other jurisdictions have approached the problem.

The Other Jurisdictions: Limitations Under Different Theories

This discussion will be confined to the following categories: the agency theory, the proximate cause theory, the "shield" cases and statutory interpretation. In determining whether a felon may be convicted under the felony-murder rule for a homicide committed by his victim (or a bystander), many courts have employed the agency theory or narrowly interpreted the felony-murder statute of their respective states to hold the defendant not guilty of murder. The proximate cause theory, used by several courts to affirm a conviction, is now in disfavor. Finally, the "shield" case rationale, although being employed to find liability is really not an application of the felony-murder rule at all.

A. The Agency Theory

Probably the earliest American case to discuss a felon's responsibility for the acts of his victim was the 1863 decision of *Commonwealth v. Campbell*.[94] In dictum the Massachusetts court stated the following example:

> Suppose . . . a burglar attempts to break into a dwelling-house, and the owner or occupant, while striving to resist and prevent the unlawful entrance, by misadventure kills his own servant. Can the burglar in such case be deemed guilty of criminal homicide? Certainly not.[95]

The court proceeded to outline its "agency" theory of criminal liability.[96] It is an accepted rule of law that persons who combine for an unlawful purpose are each legally responsible for the consequences that naturally result from the unlawful act.[97]

But, the court continued,

> [t]he rule of criminal responsibility for the acts of others is subject to the reasonable limitation that the particular act of one of a

94. 89 Mass. (7 Allen) 541, 83 Am. Dec. 705 (1863).

95. *Id.* at 545, 83 Am. Dec. at 709.

96. Several authors have used the term "agency theory," arguing that some courts have adopted agency principles to resolve problems when applying the felony-murder rule. Acts not in furtherance of the common design are not within the scope of the agency, and therefore members of the conspiracy may not be held responsible for such acts. *E.g.*, Note, *Criminal Law—Application of Felony-Murder Rule Sustained Where Robbery Victim Killed Defendant's Accomplice*, 5 DEPAUL L. REV. 298, 299 (1956); Note, *A Survey of Felony Murder*, 28 TEMP. L.Q. 453, 461 (1955).

97. PERKINS, *supra* note 1, at 632-35.

> party for which his associates and confederates are to be held liable must be shown to have been done for the furtherance or in prosecution of the common object and design for which they combined together. Without such limitation, a person might be held responsible for acts which were not the natural or necessary consequences of the enterprise or undertaking in which he was engaged, and which he could not either in fact or in law be deemed to have contemplated or intended.[98]

Since it cannot be argued that one who is resisting the commission of an unlawful act is furthering the common purpose of the conspiracy,[99] it therefore followed that a felon might be found guilty only if he or his confederates have committed the act resulting in death.

The court stated that the above analysis was correct although the taking of a human life would not have occurred but for the felon's unlawful acts, which furnished the cause for the use of weapons. It is true that the felon is in fact the cause of the death, but his liability is nevertheless limited by the rule that only acts done by a person or those with whom he is associated may be imputed to him.[100]

Although the question before the court in *Campbell* was whether a rioter may be held criminally responsible for the fatal consequences of a shot fired by a person trying to terminate the riot,[101] the case is considered the leading authority on the agency theory of criminal liability in felony-murder cases. The theory has been followed by other courts which have refused to apply the felony-murder rule when a nonparticipant in the felony fired the fatal shot.[102]

In *Commonwealth v. Moore*,[103] for example, the Kentucky court applied the same reasoning as did the Massachusetts court. In this case the two defendants attempted to rob two victims. But one victim, in an

98. 89 Mass. (7 Allen) at 544, 83 Am. Dec. at 709.

99. *Id.* at 544-45, 83 Am. Dec. at 709.

100. *Id.* at 545-46, 83 Am. Dec. at 710.

101. It may be argued that the court could have found that the defendant was criminally responsible for the death in question if it had analyzed the facts at bar in terms of *causation*. The defendant and his coconspirators had acted maliciously when they began to fire, and they were consequently responsible for the death which resulted from the return gunfire. PERKINS, *supra* note 1, at 720. Nevertheless, it remains true that the dicta in the case concerning the application of the felony-murder rule were sound: if a death is not in furtherance of the contemplated felony, malice should not be imputed under the rule. People v. Washington, 62 Cal. 2d 777, 783, 402 P.2d 130, 134, 44 Cal. Rptr. 442, 446 (1965).

102. Commonwealth v. Moore, 121 Ky. 97, 88 S.W. 1085 (1905); Commonwealth v. Balliro, 349 Mass. 505, 209 N.E.2d 308 (1965); State v. Majors, 237 S.W. 486 (Mo. 1922); *cf.* People v. Garippo, 292 Ill. 293, 127 N.E. 75 (1920); Butler v. People, 125 Ill. 641, 18 N.E. 338 (1888). *Contra,* People v. Payne, 359 Ill. 246, 194 N.E. 539 (1935).

103. 121 Ky. 97, 88 S.W. 1085 (1905).

effort to resist the robbery, shot the other victim. In affirming the order dismissing the indictment for murder, the court said:

> In order that one may be guilty of homicide, the act must be done by him actually or constructively, and that cannot be, unless the crime be committed by his own hand, or by the hands of someone acting in concert with him, or in furtherance of a common object or purpose.[104]

A different approach to the problem has been taken by some states, which have applied the doctrine of proximate cause to sustain convictions under the felony-murder rule.[105]

B. The Proximate Cause Theory

The leading authority for the incorporation of proximate cause into the felony-murder rule was *Commonweatlh v. Almeida*.[106] Although this Pennsylvania case was overruled in 1970,[107] it nevertheless remains the best exposition of the theory as it has been adopted by other jurisdictions. In *Almeida* the defendant was found guilty of murder of a police officer who was killed in the cross fire between the robbers and other police officers. The evidence did not clearly disclose who fired the fatal shot, but the trial court gave an instruction that it was immaterial whether the defendant fired the shot. The Supreme Court of Pennsylvania approved this instruction:

> If one or more persons set in motion a chain of circumstances out of which death ensues, those persons must be held responsible for any death which by direct, by almost inevitable sequence, results from such unusual criminal act.[108]

Under the *Almeida* rule, the felon need not fire the fatal shot. It is forseeable that a person attempting to rob another will meet violent resistance which may result in death. Therefore, the robbers were properly convicted of murder.[109]

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104. *Id.* at 100, 88 S.W. at 1086.

105. Hornbeck v. State, 77 So. 2d 876 (Fla. 1955); Griffith v. State, 171 So. 2d 597 (Fla. Dist. Ct. App. 1965); People v. Podolski, 332 Mich. 508, 52 N.W.2d 201 (1952); Johnson v. State, 386 P.2d 236 (Okla. Crim. App. 1963); Commonwealth v. Almeida, 362 Pa. 596, 68 A.2d 595 (1949), *cert. denied*, 339 U.S. 924 (1950), *overruled*, Commonwealth *ex rel.* Smith v. Myers, 438 Pa. 218, 261 A.2d 550 (1970). *Contra*, State v. Andreu, 222 So. 2d 449 (Fla. Dist. Ct. App. 1969).

106. 362 Pa. 596, 68 A.2d 595 (1949), *cert. denied*, 339 U.S. 924 (1950). See Commonwealth *ex rel.* Smith v. Myers, 438 Pa. 218, 261 A.2d 550 (1970), n.1 for complete history of this case.

107. Commonwealth *ex rel.* Smith v. Myers, 438 Pa. 218, 261 A.2d 550 (1970), *noted in* 43 TEMP. L.Q. 399 (1970).

108. Commonwealth v. Almeida, 362 Pa. 596, 601, 68 A.2d 595, 598 (1949).

109. *Id.* at 604-05, 68 A.2d at 600. *See also* Note, *Felon Convicted For The Death of Co-Felon During Commission of Robbery*, 43 U. DET. L.J. 118 (1965).

In the 1955 decision of *Commonwealth v. Thomas*,[110] Pennsylvania extended its rule in *Almeida*, holding that a robber may be convicted of murder for the death of his partner, who was killed by their intended victim. The person killed was irrelevant to the imposition of criminal liability, for in a gun battle engendered by a robbery attempt, it is equally foreseeable that a felon will be killed.[111]

In 1958, however, Pennsylvania began to retreat from its position taken in *Almeida* and *Thomas*. In *Commonwealth v. Redline*,[112] the defendant was convicted of murder for the death of his partner, who had been shot by a police officer. The court, declaring that *Almeida* was a "radical departure from common law criminal jurisprudence and [that] the ruling should not be extended by still further *judicial* enlargement,"[113] expressly overruled its 1955 *Thomas* decision. Although attacking *Almeida's* use of the tort concept of proximate cause, the *Redline* court did not overrule the *Almeida* decision. Rather, the court distinguished *Almeida* from *Redline* on the dubious basis that the homicide in the instant case was justifiable, for which no one may be found guilty, while the homicide in *Almeida* was merely excusable.[114]

Pennsylvania's retreat, begun in *Redline*, was completed in 1970, when the supreme court overruled *Almeida* and thus refused to apply the tort concept of proximate cause to felony-murder cases.[115] The

110. 382 Pa. 639, 117 A.2d 204 (1955), *overruled,* Commonwealth v. Redline, 391 Pa. 486, 137 A.2d 472 (1958).

111. 382 Pa. at 644-45, 117 A.2d at 206.

112. 391 Pa. 486, 137 A.2d 472 (1958), *overruling* Commonwealth v. Thomas, 382 Pa. 639, 117 A.2d 204 (1955).

113. 391 Pa. at 490, 137 A.2d at 473.

114. *Id.* at 509, 137 A.2d at 483. Recognizing that the distinction between *Almeida* and *Redline* was questionable, the court made this differentiation between justifiable and excusable homicide only to preclude the further extension of the *Almeida* rule. The court stated, "the distinction thus drawn between Almeida and the instant case on the basis of the difference in the character of the victims of the homicide is more incidental than legally significant so far as relevancy to the felony-murder rule is concerned . . . . In other words, if a felon can be held for murder for a killing occurring during the course of a felony, even though the death was not inflicted by one of the felons but by someone acting in hostility to them, it should make no difference to the crime of murder who the victim of the homicide happened to be." Id. at 509-10, 137 A.2d at 483. "The character of the deceased is deemed by some courts to be the determining issue in homicides of this nature. Under this analysis, if those defending against robbery have by accident caused the death of an innocent person the robbers are guilty of first-degree murder, whereas if one of the robbers was killed, the surviving robbers are guilty only of robbery. It is pointed out, in reaching this conclusion, that the one who fired the fatal shot is excused in the first type of situation but justified in the second; whereupon the theory is advanced that no one can be guilty of criminal homicide if the perpetrator was justified." PERKINS, *supra* note 1, at 72.

115. Commonwealth *ex rel.* Smith v. Myers, 438 Pa. 218, 261 A.2d 550 (1970). Smith was one of Almeida's cofelons.

court stated[116] that, until the *Almeida* decision, the courts had uniformly followed the rule announced in *Commonwealth v. Campbell*.[117] The court considered the *Campbell* rule to be correct for two reasons. First, the function of the felony-murder rule is to impute malice, *not the act of killing*.[118] By the use of the doctrine of proximate cause in *Almeida*, the court not only imputed the *mens rea* of murder to the defendant but also the *actus reus* of homicide. Under the felony-murder rule the malice of the initial felony attaches to only those acts that a felon or his accomplice actually commits. Second, the broad tort concept of proximate cause simply has no place in the field of criminal law:

> To persist in applying the tort liability concept of proximate cause to prosecutions for criminal homicide after the marked extension of *civil liability* of defendants in tort actions for negligence would be to extend possible *criminal* liability to persons chargeable with unlawful or reckless conduct in circumstances not generally considered to present the likelihood of a resultant death.[119]

Furthermore, the underlying rationales of criminal and tort law are different. "The former is intended to impose punishment in appropriate cases while the latter is primarily concerned with who shall bear the burden of loss."[120] Thus, the first state to use the doctrine of proximate cause in felony-murder cases will no longer apply it to impute a killing to a felon.

Michigan, which also had adopted the proximate cause theory,[121] is following the Pennsylvania lead in limiting its application. In 1963 the Michigan Supreme Court held that a felon could not be convicted of murder under the felony-murder rule when a cofelon was killed by the intended victim.[122] Michigan, however, has only gone part way in its retreat, for a felon may still be convicted of murder if the victim is an innocent party. It is hoped that Michigan will accept the Pennsylvania position that liability should not depend upon the identity of the deceased and thus repudiate the application of proximate cause in felony-murder cases.

It seems clear that courts are now reluctant to use the proximate cause doctrine in felony-murder cases. The courts that had once employed the theory are beginning to realize that its use should be severely restricted, if not totally abandoned.

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116. *Id.* at 228, 261 A.2d at 555.

117. 89 Mass. (7 Allen) 541, 83 Am. Dec. 705 (1863).

118. 438 Pa. at 227-28, 261 A.2d at 555.

119. *Id.* at 233, 261 A.2d at 557.

120. *Id.* at 232, 261 A.2d at 557, *quoting* 71 HARV. L. REV. 1565, 1566 (1958).

121. People v. Podolski, 332 Mich. 508, 52 N.W.2d 201 (1952), *cert. denied*, 344 U.S. 845 (1952).

122. People v. Austin, 370 Mich. 12, 120 N.W.2d 766 (1963).

C. Other Approaches

Since the shield cases have been discussed above,[123] only a short analysis of them is necessary. Although the defendant is convicted for a homicide committed by another person, the result may be justified without reference to the felony-murder rule. To repeat, in a typical shield case, the defendant uses an innocent party to protect himself from the fire of those who are attempting to prevent his escape.[124] The cases agree with the dicta in *Commonwealth v. Campbell*[125] that a felon should not be held responsible for acts not in furtherance of the crime, but find another basis for liability. The felon has caused the death of his victim by compelling him to maintain a position of danger where he might absorb deadly gun fire. The placing of the victim in such a position is itself a lethal act, for it is probable that he will suffer serious injury or death. In these cases, the courts are not imputing malice under the felony-murder rule; rather, the malice is express because the act of the accused is a "direct and deliberate creation of immediate lethal danger to the deceased and to him alone."[126]

Finally, in a few states judicial construction of the felony-murder statute has conferred immunity on a felon for a homicide committed by a nonfelon.[127] For example, the New York felony-murder statute requires that the killing be committed "by *a person engaged* in the commission of, or in an attempt to commit, a felony. . . ."[128] Because of the wording of the statute, the New York courts have not found it necessary to evaluate the legal theories discussed above. Instead, the courts have followed the literal wording of its felony-murder statute.[129] The result is that in New York the felony-murder rule is confined to homicides committed by felons.[130]

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123. See text accompanying note 72 *supra*.

124. Taylor v. State, 41 Tex. Crim. 564, 55 S.W. 961 (1900), *appealed*, 63 S.W. 330 (1901); Keaton v. State, 41 Tex. Crim. 621, 57 S.W. 1125 (1900).

125. 89 Mass. (7 Allen) 541, 83 Am. Dec. 705 (1863).

126. Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U. PA. L. REV. 50, 63 (1956).

127 State v. Garner, 238 La. 563, 115 So. 2d 855 (1959); People v. Woods, 9 App. Div. 2d 433, 195 N.Y.S.2d 133, *aff'd*, 8 N.Y.2d 48, 167 N.E.2d 736, 201 N.Y.S.2d 328 (1960); People v. Udwin, 254 N.Y. 255, 172 N.E. 489 (1930).

128. N.Y. PENAL LAW § 1044 (McKinney 1944), *as amended*, N.Y. PENAL LAW § 125.25(3) (McKinney 1967) (emphasis added). The revised version of the statute has made this limitation of its application even more emphatic. It provides that if "he, or another participant, if there be any, causes the death of a person other than one of the participants" during the commission of one of the enumerated felonies, they will be found guilty of murder in the first degree.

129. People v. Woods, 8 N.Y.2d 48, 53-54, 167 N.E.2d 736, 740, 201 N.Y.S.2d 328 (1960).

130. In California, of course, the application of the felony-murder statute (CAL. PEN. CODE § 189) was limited by People v. Washington, 62 Cal. 2d 777, 783, 402

Conclusion

The trend in the United States has been to limit the application of the felony-murder rule. The California rationale for restricting the scope of the doctrine was first stated in *People v. Ferlin*,[131] which held that the defendant could not be convicted for his cofelon's accidental death. Ferlin's conviction for murder was reversed because his partner's fortuitous death was clearly not in furtherance of the contemplated crime.[132] Chief Justice Traynor employed the same rationale in *People v. Washington*[133] to hold that the felony-murder rule could be applied only when one of the conspirators was the direct cause of the death in question. The Chief Justice reasoned that a homicide committed by the intended victim (and, by implication, an innocent bystander or a policeman) was "not committed to perpetrate the felony."[134]

California has been unique in applying an alternative theory under which the perpetrator of a felony who initiates a murderous gun battle may be convicted of first degree murder. In *Gilbert* the court held that the jury could convict the defendant of murder if they found that his initial shot set off a chain of events which resulted in the death of another.[135] The initial-shot test, developed in *Washington* and *Gilbert*, was repudiated in *Taylor*. In the latter case the supreme court held that the mere pointing of a gun during the perpetration of a robbery was sufficient to constitute malice and thus support a murder conviction.[136] The court effectively obliterated the distinction between the felony-murder rule and the alternative theory of liability. *Gilbert* held that the alternative theory could be applied only when the victim was responding to the initiatory acts of the felon; it could not be applied if the victim was merely attempting to prevent the robbery. Since in *Taylor*, as the dissenters pointed out, the robbery *was* the initiatory act, Chief Justice Traynor's distinction in *Gilbert* was rendered meaningless. Thus the California Supreme Court has abandoned

> the fundamental principle that the culpability of criminal defendants should be determined by their own acts—not by the fortuitous

P.2d 130, 134, 44 Cal. Rptr. 442, 446 (1965), which held that a homicide caused by a victim's resistance was not "committed in the perpetration of" the felony in question. See text accompanying notes 42-51 *supra*.

131. 203 Cal. 587, 265 P. 230 (1928).

132. See notes 17-23 & accompanying text *supra*.

133. 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965).

134. *Id.* at 781, 402 P.2d at 133, 44 Cal. Rptr. at 445. See notes 46-47 & accompanying text *supra*.

135. People v. Gilbert, 63 Cal. 2d 690, 408 P.2d 365, 47 Cal. Rptr. 909 (1965). See notes 56-62 & accompanying text *supra*.

136. Taylor v. Superior Court, 3 Cal. 3d 578, 477 P.2d 131, 91 Cal. Rptr. 275 (1970). See notes 80-84 & accompanying text *supra*.

> acts of their victims which are beyond the defendants' control and thus logically irrelevant to the defendants' culpability.[137]

Taylor has thus attempted to reverse the trend limiting the application of the felony-murder rule. By use of a broad definition of "initiatory act," the *Taylor* court has made the felony-murder rule applicable to defendants who have done no more than commit the underlying felony. Such a result is in accord neither with the previous California rule nor with the weight of authority in the other jurisdictions. It remains to be seen whether the California Supreme Court will adhere to *Taylor* or return to *Washington* and *Gilbert*.

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137. Taylor v. Superior Court, 3 Cal. 3d 578, 592, 477 P.2d 131, 140, 91 Cal. Rptr. 275, 284 (1970) (dissenting opinion).

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